Supreme Court, U.S.
FILED

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No. 03-14

In The

Supreme Court of the United States

MIGUEL BENITEZ-RUIZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD A. SMITH
SMITH LAW FIRM
314 North Second Street
Yakima, WA 98901
509-457-5108

Counsel of Record for Petitioner Benitez-Ruiz

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the statement of an alleged co-conspirator that he had obtained the heroin from Miguel Benitez-Ruiz in the Yakima area was a statement made in furtherance of the alleged conspiracy.

2. Whether the Assistant United States Attorney's intentional characterization, in his summation, of Miguel Benitez-Ruiz's testimony as a confession, constituted plain error requiring a new trial.

PARTIES TO THE NINTH CIRCUIT PROCEEDINGS

The following individuals were Plaintiffs in U.S. District Court Western District of Washington, Appellees in the Ninth Circuit, and are now Respondents before this Court:

1. United States of America

The following individual was a Defendant in U.S. District Court Western District of Washington, the Appellant in the Ninth Circuit, and is now the Petitioner before this Court:

1. Miguel Benitez-Ruiz

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Miguel Benitez-Ruiz, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in its memorandum on February 26, 2003, and the order denying rehearing en banc entered on April 8, 2003.

OPINION BELOW

On April 08, 2003, the Ninth Circuit Court of Appeals entered an order, denying rehearing *en banc*, and is reprinted in the Appendix hereto, App. 1, p. 1.

The unpublished memorandum opinion of the Ninth Circuit Court of Appeals whose judgment is herein sought to be reviewed, is case number 01-30460, and which was decided on February 26, 2003, is reprinted in the Appendix hereto, App. 2, p. 2.

The Judgment in a Criminal Case was entered on December 10, 2001, was the judgment of the United States District Court for the Western District of Washington, and is reprinted in the Appendix hereto, App. 3, p. 17.

STATEMENT OF JURISDICTION

The memorandum opinion of the Ninth Circuit was entered on February 26, 2003. The Order denying rehearing en banc was entered April 8, 2003. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND FEDERAL RULE PROVISIONS INVOLVED

The confrontation clause of the Sixth Amendment to the United States Constitution provides, in pertinent part, that:

> ... in all criminal prosecutions, the accused shall enjoy the right ... to be confronted by the witnesses against him.

Federal Rule of Evidence 801(d)(2)(E) provides:

> **(d) Statements Which Are Not Hearsay.** A statement is not hearsay if –
>
> (2) *Admission by Party-Opponent.* The statement is offered against a party and is ... (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

On July 13, 2000, Miguel Benitez-Ruiz was charged in the United States District Court for the Western District of Washington in a one count indictment charging him with conspiracy to distribute heroin and methamphetamine in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 846.

On January 11, 2001, a second superseding indictment was filed charging Miguel Benitez-Ruiz in Count 1 with conspiracy to distribute heroin in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 846; and, in Count 23 with use of a communication facility to facilitate drug trafficking offense in violation of 21 U.S.C. §§ 843(b) and (d).

Miguel Benitez-Ruiz is a 46-year-old father of 5 children. Although born in Guerrero, Mexico, he lived in the United States since 1976, and became a legal permanent resident of the United States in 1985.

The United States' case against Miguel Benitez-Ruiz rested on the testimony of Jose Lepe, David Jaimes Nava, and the recorded telephone calls between Ramon Nava-Vargas and Miguel Benitez-Ruiz. No direct evidence linked Miguel Benitez-Ruiz to any conspiracy.

David Jaimes Nava testified at the request of the Government, in part, as follows:

Q Do you know Lucatero Ramiro?

A I saw him one time at a distance.

Q Do you know if he supplied heroin to Tomate or your father?

A His father told me he did.

Q Does he live near – does Lucatero live near your village in Mexico?

A About an hour's distance.

Q And where is that located in Mexico?

A In a town called La Bocanda.

Q Have you ever driven there from Seattle?

A I didn't understand the question.

Q Have you ever driven a car from Seattle to your village in Mexico?

A In two occasions.

Q How long did it take?

A From here to Mexico?

Q To Apatzingan.

A Two days. If I don't sleep, in a day and a half I could be there.

Q Directing your attention to last summer. Was there an incident where you loaned – where Tomate asked you for some heroin and you gave him some on loan?

A Yes.

Q Do you know when that was?

A I believe it was in the month of June. I don't know. I don't remember exactly whether it was in June or July.

Q Did Tomate explain how he was going to pay you back?

A He told me that when they would bring him his he would give it back to me.

Q Did you say who would bring him his?

MR. ENGLEHARD: Your Honor, I object. Hearsay.

THE COURT: Well, I think it comes in under the exception. Your objection is noted. Overruled.

MR. ENGLEHARD: Your Honor –

THE COURT: Just a moment.

MR. ENGLEHARD: Your Honor, I'm sorry, I just want to see if I can have a

continuing objection to this – all questions regarding where Tomate received his heroin.

THE COURT: And these are conversations between this witness and Tomate?

MR. ENGLEHARD: Tomate, exactly.

THE COURT: All right. The objection is overruled and you can have a running objection –

MR. ENGLEHARD: Thank you.

THE COURT: – to that line of inquiry.

A He told me that when Mr. Miguel exchanged the ones he had brought him, because the ones he brought were no good, then he would pay me back.

Q (By Mr. Whalley) Did he say what quantity he expected to get?

A He said that he had brought him 280 and he was going to exchange those.

Q Who had brought who 280?

A That Mr. Miguel had brought him 280, but that he was going to exchange those because they were no good.

Q Did he tell you Mr. Miguel's last name?

A No.

Q Did he say who Mr. Miguel got the Heroin from?

A No.

Q What was wrong with the heroin?

A That it was low.

Q Low? What does that mean?

A That when people use it the effect doesn't last long.

Q Did he say where Mr. Miguel lived?

A He told me he lived around the Yakima Valley.

Q In Yakima, in the city of Yakima?

A He didn't tell me what city. When we spoke of the valley of Yakima, we were referring to all the towns.

[RT 1262-1264]

The testimony of David Nava as it pertained to Miguel Benitez-Ruiz consisted of a claim that Ramon Nava-Vargas ("Tomate") told him that he had obtained heroin from "Miguel" in the Yakima area. [RT 1264] Mr. Nava admitted that at the time, he was a competitor with Tomate in the sale of heroin, and that Tomate was generally able to undersell Nava. [RT 1279] Mr. Nava never suggested that Tomate's claim as to the source of heroin was of any value to him in his drug dealing. Indeed, the alleged statement appears to be purposely vague so as not to provide any useful information to Mr. Nava.

The entire evidence against Miguel Benitez-Ruiz was far from overwhelming. Furthermore, Mr. Benitez-Ruiz presented a strong defense which included the testimony of numerous witnesses establishing that he did not ever bring illegal drugs into the United States from Mexico. In

addition, the defense showed that Mr. Ruiz was a hard-working farmworker, with a clean record, and a deserved reputation for being law abiding.

In his summation, the Assistant United States Attorney told the jury that Mr. Benitez-Ruiz confessed to a crime which he clearly disputed and had maintained his innocence throughout the trial.

In his summation, the Assistant United States Attorney argued in part as follows:

> "The second thing we have to prove is that the defendant joined the conspiracy with the intention to help accomplish its object. The single object of this conspiracy is to distribute heroin. He admitted it. He admitted it."
>
> [RT 1541]

Then again:

> "Ladies and gentlemen, the defendant admitted this offense on cross-examination."
>
> [RT 1543]

The Assistant United States Attorney continued:

> "This call convicts the defendant even if he hadn't confesses during his cross-examination. With the confession, it makes it overwhelming that the defendant is both a member of the conspiracy and was involved in furthering the conspiracy."
>
> [RT 1546]

Finally, the Assistant United States Attorney argued:

> "His explanation was so ineffective that on cross-examination he essentially conceded his guilt."
>
> [RT 1546]

The Assistant United States Attorney repeatedly mischaracterized evidence in his summation in a manner which was extremely prejudicial to Miguel Benitez-Ruiz. Statements by the Assistant United States Attorney charging that Miguel Benitez-Ruiz confessed were serious and deliberate. The actual evidence of Miguel Benitez-Ruiz's guilt was far from overwhelming. There was no evidence that Miguel Benitez-Ruiz was involved in the transportation of any drugs. At no time was Miguel Benitez-Ruiz ever seen by surveillance or anyone handling or holding contraband. The Assistant United States Attorney argued to the jury in a close case that Mr. Benitez-Ruiz admitted on the stand to distributing heroin. This statement is false. As is the statement by the Assistant United States Attorney, "Ladies and gentlemen, the defendant admitted this offense on cross-examination." [RT 1543].

The characterization by the Assistant United States Attorney was improper and constituted plain error.

REASONS FOR GRANTING THE WRIT

1. The error in the admission of evidence pursuant to ER 801(d)(2)(E) is of constitutional magnitude and the conviction should be reversed unless the error was harmless beyond a reasonable doubt.

The judgment of the United States Court of Appeals for the Ninth Circuit should be reviewed because the Court's opinion focused on the declarant's (David Nava) role and interest in the conspiracy rather than the motivation behind his statements.

The limitations of ER 801(d)(2)(E) are coextensive with the confrontation clause of the Sixth Amendment. *Bourjaily v. United States*, 483 U.S. 171 (1987); *United States v. Bibbero*, 749 F.2d 581, 584 (9th Cir. 1984), *cert. denied,* 471 U.S. 1103 (1985). The Sixth Amendment is only satisfied if the requirements of ER 801(d)(2)(E) are strictly adhered to.

The testimony of David Nava as it pertained to Miguel Benitez-Ruiz consisted of a claim that Ramon Nava-Vargas ("Tomate") told him that he had obtained heroin from "Miguel" in the Yakima area. [RP 1264] Mr. Nava admitted that at the time, he was a competitor with Tomate in the sale of heroin, and that Tomate was generally able to undersell Nava. [RP 1279] Mr. Nava never suggested that Tomate's claim as to the source of heroin was of any value to him in his drug dealing. Indeed, the alleged statement appears to be purposely vague so as not to provide any useful information to Mr. Nava.

Furthermore, there is no evidence that, with this alleged statement, Tomate intended to set any transaction in motion. Mr. Nava was never asked to assist with any

drug shipments from "Miguel" or to have any other interaction with "Miguel." Indeed, Mr. Nava testified that he never met defendant Ruiz. Rather, it was idle conversation between two relatives involved in the same illegal business.

David Nava testified also that he sold heroin to his father's customers and that when Tomate was out of heroin they, "had agreed that (Nava) would lend him some and...agreed that if (Nava) were ever out that (Tomate) would give (Nava) some." Tomate and Nava had previously agreed that they would always lend one another heroin as needed and consequently the source and the method of paying it back didn't matter because these were transactions between relatives and pursuant to their agreement.

> Q Did you work with Ramon Nava-Vargas in distributing heroin?
>
> A We didn't work together. We each worked separately. But when he needed heroin and he didn't have anybody to supply it for him, he would ask me for it, or when I didn't have any, I would ask him to lend me some.
>
> Q And would he do that?
>
> A Yes.
>
> [RP 1261]

At trial no circumstance surrounding the statement was presented. No foundation was elicited to show that the statement identifying Mr. Benitez-Ruiz and how and when Tomate would pay Nava back, was not simply idle conversation between two co-conspirators who had previously agreed on how they would transact business. The

statements regarding Mr. Benitez-Ruiz identifying him as the source and when and how the pay-back would occur did not induce the transaction and no evidence supports the Court's position that it did induce the transaction. The transaction, i.e., loaning the heroin to one another, was agreed to long before any involvement by Mr. Benitez-Ruiz.

Consequently, Mr. Benitez-Ruiz requests that the Court grant his petition for writ of certiorari.

2. The Ninth Circuit's opinion fails to guarantee Mr. Benitez-Ruiz's right to a fair trial.

The Government's conduct when prosecuting a defendant may determine whether or not a defendant is afforded his right to a fair trial. *Viereck v. United States,* 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734 (1943).

The principles set forth in *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) forbid conduct that deprives an accused of his right to a fair trial. The Government prosecutor may not express to the jury his personal knowledge of the guilt of the accused. *United State v. Bess*, 593 F.2d 749 (6th Cir. 1979).

This is precisely what occurred here in the trial court and that harm is exacerbated in the close case. *See Viereck v. United States, Id.; Berger v. United States, Id; United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991). Where a prosecutor's remarks are improper and the evidence is marginal a conviction will be reversed. *United States v. Johnson,* 968 F.2d 768 (8th Cir. 1982). In its memorandum opinion, the Court of Appeals stated that, "Mr. Ruiz acknowledged on cross-examination that he discussed

heroin with Tomate during one of their telephone conversations and that he knew that Tomate and another individual were drug dealers and Tomate was waiting for drugs so he could pay back money owed to Ruiz."

Miguel Benitez-Ruiz was subjected to significant cross-examination regarding the telephone transcripts. The following cross-examination occurred with regard to Exhibit 86 and is the basis for the statements by the Court of Appeals in its memorandum opinion.

Q And then Tomate says, "Because, well, he brought me another, he sent me work." And did you say in response to that, "What do you mean" ?

MR. ENGLEHARD: Your Honor, I object. The transcript speaks for itself.

MR. WHALLEY: I can rephrase it.

Q (By Mr. Whalley) Why did you not say, "What do you mean"?

A Because, no, I'm talking about my work. That's work.

Q Tomate said – he was referring to Millo and saying Millo sent me work, wasn't he?

A Yes.

Q And that means drugs, doesn't it?

A Well, I imagine, yeah, that they're talking about drugs.

Q Why is Tomate talking to you about drugs?

A That's an assumption he's making.

Q The next page, he says – he's describing what Millo did. "He gave me the same as the first time this time, and I am waiting though." Do you recall that?

A Yes.

Q And then you responded, "How strange. According to him he sent a better one so hat the other one would get out."

A Yes.

Q And you were talking about drugs, heroin?

A Well, I suppose so, because he told me – the Saturday prior he told me now he will pay you because I sent him something better, I sent – sent him a better work. So I kept continuing on with the conversation with him.

Q What in the world were you talking about?

A Well, apparently drugs that one was sending to the other.

Q They were talking about drugs?

A Yes.

Q You knew it?

A Yes.

Q And you were waiting to be paid and Tomate was waiting for the drugs so he could pay you?

A Yes.

Q So did you know that Tomate was a drug dealer then?

A Yes, I knew that he was a drug dealer.

Q And you knew Lucatero was a drug dealer?

A Yes, I knew that he was sending him drugs.

Q And so you made trips down there after knowing this?

A I make trips to see my family.

Q And to help Lucatero?

A To bring him an ice box and some clothes.

[RP 1345-1347]

Throughout the intense cross-examination, Mr. Ruiz maintained his innocence. The statements made by the Assistant United States Attorney, were in part as follows:

> "The single object of this conspiracy is to distribute heroin. He admitted it. He admitted it." [RT 1541]
>
> "Ladies and gentlemen, the defendant admitted this offense on cross-examination." [RT 1543]
>
> "This call convicts the defendant even if he hadn't confessed during his cross-examination. With the confession, it makes it overwhelming that the defendant is both a member of the conspiracy

> and was involved in furthering the conspiracy." [RT 1546]

These statements are false. The characterization by the Assistant United States Attorney was improper. In a case so close where the jury deliberated for almost three days, the Court cannot find that the Assistant United States Attorney's improper remarks did not seriously affect the fairness and integrity of the judicial proceedings.

CONCLUSION

Based upon the foregoing, Miguel Benitez-Ruiz requests the Court grant his petition for writ of certiorari.

Respectfully submitted,

RICHARD A. SMITH
SMITH LAW FIRM
314 North Second Street
Yakima, WA 98901
509-457-5108

Counsel for Petitioner Benitez-Ruiz

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APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JESSE MARTINEZ-GONZALEZ, Defendant-Appellant.	No. 01-30459 D.C. No. CR-00-00330-21-TSZ MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MIGUEL BENITEZ-RUIZ, Defendant-Appellant.	No. 01-30460 D.C. No. CR-00-00330-TSZ

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OSMAN ALEJANDRO MENCIA-MORALES, Defendant-Appellant.	No. 02-30178 D.C. No. CR-00-00330-Z-27

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted January 7, 2003
Seattle, Washington

(Filed Feb. 26, 2003)

Before WALLACE, TROTT and TASHIMA, Circuit Judges.

Jesse Martinez-Gonzalez ("Martinez-Gonzalez"), Miguel Benitez-Ruiz ("Ruiz"), and Osman Alejandro Mencia-Morales ("Mencia-Morales") were charged with various crimes related to a heroin and methamphetamine distribution operation. Martinez-Gonzalez and Ruiz were convicted by juries on all charges; each appeals his convictions. Mencia-Morales appeals the sentence imposed after he pled guilty. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

DISCUSSION

I Martinez-Gonzalez

Martinez-Gonzalez argues that the Government presented insufficient evidence to support his convictions

for one count of conspiracy to distribute heroin and two counts of possession with intent to distribute. We review sufficiency of the evidence claims to determine whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Booth,* 309 F.3d 566, 574 n.5 (9th Cir. 2002) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis in original)). "The issue of whether a single conspiracy has been proved is a question of sufficiency of the evidence." *United States v. Duran,* 189 F.3d 1071, 1078 (9th Cir. 1999).

A. Conspiracy Conviction

Martinez-Gonzalez claims that there was insufficient evidence to support his conspiracy conviction because the Government charged a single conspiracy, "but the evidence at trial established two conspiracies." A single conspiracy can be demonstrated by evidence showing that "each defendant knew, or had reason to know, . . . that his benefits were probably dependent upon the success of the entire operation." *Duran,* 189 F.3d at 1080 (citation and internal quotation marks omitted). "Typically, the inference of an overall agreement is drawn from proof of a single objective . . . or from proof that the key participants and the method of operation remained constant throughout the conspiracy." *Id.* (internal citations omitted).

Here, the key conspirators remained constant. A member of the conspiracy, Jose Lepe ("Lepe"), testified at trial that brothers Ramon Nava-Banuelos, Gonzalo Banuelos-Hernandez ("Gonzalo"), and Filemon Nava-Banuelos made their living selling drugs, as did their children

Ramon Nava-Vargas ("Tomate"), Joel Nava-Vargas ("Joel"), and David Nava ("Nava"). Nava testified that he purchased heroin from Modesto Vargas in Apatzingan, Mexico, and that everyone in his family knew Vargas. Nava explained that the various members of his family distributed heroin on their own so he could not answer the question of "who was in charge." However, Nava testified also that he sold heroin to his father's customers and that when Tomate was out of heroin they "had agreed that [Nava] would lend him some, and . . . agreed that if [Nava] were ever out that [Tomate] would give [Nava] some." Tomate and Nava benefitted from each other's activities, as did Martinez-Gonzalez, who purchased heroin from both Tomate and Nava. After viewing this evidence in the light most favorable to the Government, we conclude the Government demonstrated that only one conspiracy existed.

Martinez-Gonzalez argues that even if one conspiracy existed, he was not a party to that conspiracy. A "slight connection" is sufficient to connect Martinez-Gonzalez to the conspiracy. *United States v. Vaughn,* 797 F.2d 1485, 1492 (9th Cir. 1986). "The term 'slight connection' means that [Martinez-Gonzalez] need not have known all the conspirators, participated in the conspiracy from its beginning, participated in all its enterprises, or known all its details." *United States v. Herrera-Gonzalez,* 263 F.3d 1092, 1095 (9th Cir. 2001).

Nava testified that he sold heroin to Martinez-Gonzalez in 1997 and twice in 2000 and that Martinez-Gonzalez knew everybody in his family. Agents intercepted several calls involving Tomate, Martinez-Gonzalez, and Joel using code to discuss drug transactions. Agents observed Gonzalo and Tomate visit Martinez-Gonzalez's

home shortly after Martinez-Gonzalez and Tomate engaged in telephone conversations using code to arrange heroin purchases. Based on all the evidence, the jury could rationally deduce that Martinez-Gonzalez was involved in a single conspiracy to distribute heroin.

B. Substantive Counts

Martinez-Gonzalez also challenges the sufficiency of the evidence underlying his conviction on two counts of possession with intent to deliver heroin. Count 13 alleged that Martinez-Gonzalez possessed 100 grams or more of heroin on June 9, 2000. In conversations recorded on June 9th, between Martinez-Gonzalez and Tomate and Tomate and his brother Joel, the participants used the phrases: "tripe tacos," and "It's for eight glasses . . . Guys, of course." Martinez-Gonzalez asked Tomate "what happened with the – those guys," and said a "buddy was going to stop by so that he – so that he could take a look at it. . . . " Three and one-half hours later, Martinez-Gonzalez again told Tomate he needed "about seven boys," stated that he "put one to work," and asked Tomate if he had "the other one." Shortly after this conversation, law enforcement agents followed Gonzalo (Tomate's roommate) from Tomate's apartment building to 7319 16th Avenue S.W., the home where Martinez-Gonzalez resided. Gonzalo and another man were admitted to the house and stayed about a half-hour.

At trial, Lepe explained that heroin sold in large quantities was divided in "pieces," with one piece being equal to 25 grams. Lepe testified that drug dealers sometimes refer to heroin pieces as "bring me a guy" or "muchachas." Nava stated that he sold pieces of heroin to

Martinez-Gonzalez in 1997 and twice in 2000. Nava testified that "tripes" meant three pieces of heroin and he thought Martinez-Gonzalez had used that word before. Nava testified also that Tomate accompanied him once when he delivered heroin to Martinez-Gonzalez.

Count 32 charged Martinez-Gonzalez with possession of heroin with intent to distribute. On June 20, 2000, law enforcement agents recorded conversations between Tomate and Martinez-Gonzalez and Tomate and Joel. Tomate and Martinez-Gonzalez arranged to meet in forty minutes and discussed the "tripes" Martinez-Gonzalez requested. Then Tomate called Joel and asked if "there [are] three spoons," directed Joel to "measure . . . the three spoons," and asked Joel to "bring them to me outside." Agents observed Joel hand something to Tomate in the parking lot of their apartment building. Then Tomate proceeded to Martinez-Gonzalez's residence, arriving with three other men. Martinez-Gonzalez exited his house and walked toward the rear of the house with Tomate. Tomate left five minutes later.

Agents intercepted other calls between Tomate and Martinez-Gonzalez using the term "guys." Lepe and Nava testified that "guys" and "tripes" are code for heroin pieces. Nava provided testimony about Martinez-Gonzalez's long term involvement in purchasing heroin. In addition, a paid informant, X-O-L Martinez-Lopez ("Lopez"), testified that he phoned Martinez-Gonzalez to arrange a heroin purchase. Martinez-Gonzalez agreed to meet Lopez and they discussed, but never completed, a drug transaction. Lopez's testimony provided additional evidence that Martinez-Gonzalez was involved in heroin distribution. Given this context, a rational jury could reasonably infer that the phone conversations between Martinez-Gonzalez

and Tomate were discussions of drug transactions. Viewing all the evidence in the light most favorable to the Government, we conclude sufficient evidence existed to find that Martinez-Gonzalez committed the crimes of possession with intent to deliver heroin. Accordingly, we affirm Martinez-Gonzalez's convictions.

II Ruiz

Ruiz was convicted of conspiracy to distribute heroin and use of a telephone to facilitate a drug trafficking offense. Ruiz argues that his convictions should be reversed on several grounds. Because Ruiz failed to demonstrate that the district court erred or abused its discretion, we affirm.

A. Transcripts in the Jury Room

Ruiz argues that English translation transcripts of telephone calls should not have been allowed into the jury room because it unfairly emphasized portions of trial testimony favorable to the Government. "Where there is no dispute as to accuracy, we review for abuse of discretion the district court's decision" to allow the English translations of wiretap transcripts in the jury room. *United States v. Abonce-Barrera,* 257 F.3d 959, 963 (9th Cir. 2001). "Under the abuse of discretion standard, we will not reverse unless we have a definite and firm conviction that the district court committed a clear error in judgment." *United States v. Hernandez,* 27 F.3d 1403, 1408 (9th Cir. 1992) (citation omitted).

In *Abonce-Barrera,* we upheld the district court's admission of English translations of recordings which

"provided key evidence of [the defendant's] involvement" in the drug distribution conspiracy. 257 F.3d at 962. Similarly, the district court here did not abuse its discretion by allowing the jury to take the transcripts into the jury room.

B. Admission of Alleged Hearsay Testimony

Ruiz argues that part of Nava's testimony was inadmissible because it did not satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E). Rule 801(d)(2)(E) provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. We review for abuse of discretion a district court's decision to admit evidence as an exception to the hearsay rule. *United States v. Hernandez-Herrera,* 273 F.3d 1213, 1217 (9th Cir. 2001).

Nava testified that he and Tomate would supply heroin to each other on occasion. Nava described an incident when Tomate asked to borrow some heroin. Nava testified that he agreed to loan Tomate the heroin and Tomate responded that he would pay Nava back when "Mr. Miguel [Ruiz] exchanged the ones he had brought to him," because "the ones he brought were no good." The district court concluded that "[t]hese statements helped to induce the transaction because they explained the reason why [Tomate] needed a loan of heroin, and also explained how he intended to repay that loan."

The district court did not abuse its discretion in concluding that Tomate's statements furthered the conspiracy. The statements were made to Nava, someone who had more than a minimal role in the conspiracy and who possessed a substantial interest in the conspiracy. *Cf.*

United States v. Moody 778 F.2d 1380, 1382-83 (9th Cir. 1985) (emphasizing the difference between statements made to someone with a "limited role" as an equipment manager and "one who possessed a substantial interest in the continuing operation of the conspiracy"). In this context, the district court did not abuse its discretion by concluding the statement was "in furtherance" of the conspiracy.

C. Ineffective Assistance of Counsel

Ruiz claims he received ineffective assistance of counsel. Ordinarily, we do not reach claims of ineffective assistance of counsel on direct appeal, and we decline to do so here. *United States v. Ross,* 206 F.3d 896, 900 (9th Cir. 2000). *See also United States v. Robinson,* 967 F.2d 287, 290 (9th Cir. 1992) (stating that ineffective assistance of counsel is more properly raised by collateral attack unless the record is sufficient or there is an obvious denial of a defendant's Sixth Amendment right to counsel).

D. Vouching

Ruiz argues also that the Assistant United States Attorney vouched for the Government's witness, Lepe, by asking him about his plea agreement on direct examination and by arguing in closing that Lepe was required to testify against Ruiz. Because Ruiz failed to raise this argument at trial, we review for plain error. *United States v. Necoechea,* 986 F.2d 1273, 1276 (9th Cir. 1993). We should reverse "only if, viewing the error in the context of the entire record, the impropriety 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings, or where failing to reverse a conviction would

amount to a miscarriage of justice.'" *Id.* (quoting *United States v. Molina,* 934 F.2d 1440, 1446 (9th Cir. 1991)).

"Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." *Necoechea,* 986 F.2d at 1276. During direct examination of Lepe, the AUSA asked him about the specifics of his plea agreement. Lepe responded that he agreed "[t]o tell the truth and nothing but the truth and if [he] had to come and testify, [he] had to come and testify." This is not vouching. *See Necoechea,* 986 F.2d at 1278-80 (concluding that a prosecutor's elicitation of testimony regarding a witness's plea agreement and its truthfulness provision was not vouching because "[t]he prosecutor's question [of whether the plea agreement required her to testify truthfully and cooperate] [did] not imply a guaranty of [the witness's] truthfulness, refer to extra-record facts, or reflect a personal opinion" and declining to hold that "any reference to truthfulness provisions is plain error").

The AUSA's closing argument also did not involve vouching. The AUSA stated: "I don't apologize for putting on any of these co-conspirators [including Lepe] and requiring them to point the finger at who they were working with, even if its their own family. There's a higher ideal at work here and it's truth and the well-being of our nation." The AUSA did not imply a guarantee of the witness's truthfulness, refer to extra-record facts, or reflect a personal opinion. *See id.* The AUSA did not "vouch" for Lepe and, thus, no plain error occurred.

E. Arguing Facts Not in Evidence

Ruiz contends that the AUSA during summation argued facts not in evidence when he characterized Ruiz's statements during cross-examination as a "confession." Because Ruiz did not object at trial, we review for plain error, reversing "only if, viewing the error in the context of the entire record, the impropriety 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings, or where failing to reverse a conviction would amount to a miscarriage of justice.'" *Necoechea,* 986 F.2d at 1276 (brackets in original) (quoting *United States v. Molina,* 934 F.2d 1440, 1446 (9th Cir. 1991)).

Ruiz acknowledged on cross-examination that he discussed heroin with Tomate during one of their telephone conversations. Ruiz admitted also that he knew Tomate and another individual were drug dealers and that Tomate was waiting for drugs so he could pay back money he owed Ruiz. Given Ruiz's admissions, the statements objected to do not fall into the "plain error" category.

F. Cumulative Errors

Finally, Ruiz argues that the cumulative effect of the alleged errors denied him a fair trial. "Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal." *Necoechea,* 986 F.2d at 1282. Ruiz demonstrated no individual errors; accordingly, no cumulative error occurred, and we affirm Ruiz's convictions.

III Mencia-Morales

Mencia-Morales claims that the district court failed to comply with former Federal Rule of Criminal Procedure 32(c) and erred in applying a two-level supervisory role sentencing enhancement. We review for clear error the district court's findings made during the sentencing phase, and review de novo the district court's interpretation of the sentencing guidelines and its compliance with Federal Rule of Criminal Procedure 32. *United States v. Williams*, 291 F.3d 1180, 1196 (9th Cir. 2002) (citations omitted); *United States v. Herrera-Rojas*, 243 F.3d 1139, 1142 (9th Cir. 2001).

Mencia-Morales argues that the district court violated Rule 32 because it allegedly did not resolve a discrepancy between the presentence report's ("PSR") version of his relationship with a co-defendant, and Mencia-Morales's characterization of the relationship. Former federal Rule of Criminal Procedure 32(c)(1) provided that "[f]or each matter controverted, the [sentencing] court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account."

At sentencing, defense counsel agreed with the district court that he did not have any objection to the accuracy of the facts contained in PSR, and he agreed that Mencia-Morales's co-defendant said the things the PSR attributed to him. Mencia-Morales, therefore, "did not challenge the accuracy of any information in the [PSR], only inferences drawn from it." *United States v. Rigby*, 896 F.2d 392, 394 (9th Cir. 1990). Mencia-Morales merely requested that the district court accord more weight to his characterization of his relationship with the co-defendant,

and to the letter he submitted in support, than to the facts in the PSR.

The court considered Mencia-Morales's information but resolved the issue against him, explaining "that the facts stated in paragraphs 34 through 38 [of the PSR] provide by a preponderance of the evidence the fact that [Mencia-Morales] was such a leader, supervisor, that pursuant to the guidelines, two levels should be added." *See id.* at 394 (concluding the district court "clearly explained the basis for its ruling, finding that the presentence report and addendum were correct"). Mencia-Morales has not demonstrated that the district court failed to comply with Rule 32.

The district court also did not err by applying the supervisory role enhancement. The Guidelines provide for an increase in a base offense level if a defendant "was an organizer, leader, manager, or supervisor in any criminal activity." U.S.S.G. § 3B1.1(c). "[T]he district court "may, without error, rely on evidence presented in the PSR to find by a preponderance of the evidence that the facts underlying a sentence enhancement have been established." *United States v. Maldonado,* 215 F.3d 1046, 1051 (9th Cir. 2000). The PSR detailed how a co-defendant frequently acted under Mencia-Morales's direction and, thus, contained sufficient information for the district court to apply the enhancement. Accordingly, we affirm Mencia-Morales's sentence.

AFFIRMED.

APPENDIX 2

UNITED STATES DISTRICT COURT
Western District of Washington

UNITED STATES OF AMERICA

V.

MIGUEL BENITEZ-RUIZ

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

(Filed Dec. 10, 2001)

Case Number:
CR00-0330Z-13

William R. Michelman
Defendant's Attorney

THE DEFENDANT:

____ pleaded guilty to count _____
____ pleaded nolo contendere to count(s) _____ which was accepted by the court.
XX was found guilty on counts 1 and 23 of the Second Superseding Indictment of January 11, 2001, after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846	Conspiracy to Distribute Heroin	09/05/2000	1
21 U.S.C. §§ 843(b) and (d)	Use of a Communication Facility to Facilitate a Drug Trafficking Offense	06/15/2000	23

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

____ The defendant has been found not guilty on count(s) ____

____ Count(s) _____ (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
535-04-2639

Defendant's Date of Birth:
April 24, 1954

Defendant's USM No.:
15308-085

Defendant's Residence Address:

In Custody of the United States Marshals' Service

Defendant's Legal Address:

322 Cedar Street, Post Office Box 787
Mabton, Washington 98935
509/894-4781

DOUGLAS B. WHALLEY
/s/ Douglas B. Whalley
Assistant United States Attorney

December 7, 2001
Date of Imposition of Sentence

/s/ Thomas S. Zilly
Signature of Judicial Officer

THE HONORABLE THOMAS S. ZILLY
United States District Judge
Name & Title of Judicial Officer

December 7, 2001
Date

IMPRISONMENT

The Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 months.

XX The court makes the following recommendations to the Bureau of Prisons:

Placement at Sheridan, Oregon

___ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district:

___ at _____ a.m./p.m. on _____.

___ as notified by the United States Marshal.

XX The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

___ at _____ a.m./p.m. on _____.

___ as notified by the United States Marshal.

XX as notified by the Probation or Pretrial Services Office, within 30 days, by 4 p.m. on January 7, 2002, at the US Marshal's Office in Yakima or Seattle, WA

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at ___ _____, with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another Federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

XX The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer, pursuant to 18 U.S.C. § 3563(a)(5) and 18 U.S.C. § 3583(d).

___ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

XX The defendant shall not possess a firearm, or other destructive device, as defined 18 U.S.C. § 921. (Check if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below):

SEE ATTACHED SPECIAL CONDITIONS OF SUPERVISION

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time, at home or elsewhere, and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or

characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall submit to a search of his person, residence, office, property, storage unit, or vehicle conducted in a reasonable manner at a reasonable time by a United States Probation Officer.

2. The defendant shall provide his United States Probation Officer with access to any requested financial information, including authorization to conduct credit checks and obtain copies of his Federal Income Tax Returns.

3. If deported, the defendant shall not reenter the United States without permission of the Immigration and Naturalization Service. If granted permission to reenter, the defendant shall contact the nearest United States Probation Office within 72 hours of reentry.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS:	$ 200.00	$	$

___ If applicable, restitution amount ordered pursuant to plea agreement. . . . $ _____

FINE

XX The Court finds that the defendant is financially unable, and is unlikely to become able, to pay a fine and, accordingly, the imposition of a fine is waived.

The above fine includes costs of incarceration and/or supervision in the amount of $ _____

RESTITUTION

__ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

__ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment, unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
	$	$	
Totals:	$ _____	$ _____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

INTEREST ON FINES AND RESTITUTION

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

__ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

__ The interest requirement is waived.

__ The interest requirement is modified as follows:

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. XX in full immediately; or

B. ___ $ _____ immediately, balance due (in accordance with C, D, or E); or

C. ___ not later than _____; or

D. ___ in installments to commence ___ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule, if appropriate; or

E. ___ in _____ *(e.g., equal, weekly, monthly, quarterly)* installments of $ _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

XX MAKE CHECK(S) FOR ALL CRIMINAL MONETARY PENALTIES, INCLUDING SPECIAL ASSESSMENTS, FINES, AND RESTITUTION, PAYABLE TO:

United States District Court Clerk, Western District of Washington. For restitution payments, the Court is to forward money received to _____ (name of party[ies] receiving restitution). See address on page ____ of this judgment.

___ The defendant shall pay the cost of prosecution.

___ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States Attorney.

APPENDIX 3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MIGUEL BENITEZ-RUIZ, Defendant-Appellant.	No. 01-30460 D.C. No. CR-00-00330-TSZ Western District of Washington, Seattle ORDER (Filed Apr. 8, 2003)

Before: WALLACE, TROTT and TASHIMA, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Trott and Tashima have voted to deny the petition for rehearing en banc, and Judge Wallace so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.